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No. 74-1232

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

BELTRONICS, INC., Petitioner,

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.
and
WESTERN ELECTRIC COMPANY, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS EBERLINE INSTRUMENT CORPORATION AND CAPCO, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Denying Writ	8
I. THE *SCHWINN* DOCTRINE CLAIM WAS OUTSIDE THE SCOPE OF PETITIONER'S PLEADINGS, AN UNCURED DEFECT WHICH HAS NOT BEEN RAISED IN THE PETITION FOR A WRIT OF CERTIORARI	9
II. UNDER THE FACTS FOUND BY THE TRIAL COURT AND UPHELD BY THE COURT OF APPEALS, THERE IS NO CONFLICT BETWEEN THE DECISION OF THE LOWER COURTS AND *UNITED STATES V. ARNOLD SCHWINN & CO.*	12
III. WITH RESPECT TO THE ALLEGED *SCHWINN* CLAIM, THERE IS NO BASIS FOR REVIEW OF THE LOWER COURT'S HOLDINGS WITH RESPECT TO EBERLINE	14
IV. THE FACTUAL BASES FOR THE LOWER COURTS' FINDINGS AND CONCLUSIONS THAT NO DAMAGE COULD BE OR WAS CAUSED TO BELTRONICS PRECLUDES ANY CONTENTION THAT THE	

Page

COURT OF APPEALS' DECISION CONFLICTS WITH *PERKINS V. STANDARD OIL COMPANY OF CALIFORNIA* 16

V. THE LOWER COURT'S HOLDINGS ARE ALTERNATIVE HOLDINGS, HOLDING NOT ONLY THAT NO *SCHWINN* CLAIM WAS ASSERTED OR ESTABLISHED AND THAT DEFENDANT'S CONDUCT DID NOT CONTRIBUTE TO ANY INJURY OF PETITIONER, BUT ALSO HOLDING THAT THERE WAS NO COMPETENT EVIDENCE TO SHOW THAT PETITIONER WAS DAMAGED IN ANY EVENT 18

Conclusion 20

TABLE OF AUTHORITIES

Cases: *Page*

Albrecht v. Harold Co.
452 F.2d 124 (8th Cir. 1971) 19

Billy Baxter, Inc. v. Coca Cola Co.
431 F.2d 183 (2d Cir. 1970) *cert. denied,*
401 U.S. 923 (1970) 18

Beltronics, Inc., et al v. Eberline Instrument Corporation, et al.
369 F. Supp. 295 (D. Colo. 1973) ... 1, 3, 7, 11, 13, 14, 16

Beltronics, Inc. v. Eberline Instrument Corporation, et al.
509 F.2d 1316 (10th Cir. 1974) .. 2, 3, 6, 11, 13, 14, 15, 16

Colorado Pump & Supply Co. v. Febco, Inc.
472 F.2d 637 (10th Cir. 1973) *cert. denied,*
411 U.S. 987 (1973) 10

Continental Baking Co. v. Utah Pie Co.
396 F.2d 161 (10th Cir. 1968) *cert. denied,*
393 U.S. 860 (1968) 19

Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.
459 F.2d 138 (6th Cir. 1972) 19

Farmington Dowell Products Co. v. Forester Mfg. Co.
421 F.2d 61 (1st Cir. 1969) 19

Gustafson v. General Motors Acceptance Corporation
470 F.2d 1057 (8th Cir. 1973) 19

Klors, Inc. v. Broadway-Hale Stores, Inc.
359 U.S. 207 (1959) 11

In Re Multidistrict Vehicle Air Pollution MDL No. 31
481 F.2d 122 (9th Cir. 1973) *cert. denied,*
414 U.S. 1045 (1973) 17

Page

Perkins v. Standard Oil Company of California
395 U.S. 642 (1969) 8, 9, 15, 17

Riebert v. Atlantic Richfield Co.
471 F.2d 727 (10th Cir. 1973) *cert. denied*,
411 U.S. 938 (1973) 18

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.
416 F.2d 71 (9th Cir. 1969) *cert. denied*,
396 U.S. 1062 (1970) 19, 20

United States v. Arnold Schwinn & Co.
388 U.S. 365 (1967) 8, 10, 11, 12

Volasco Products Co. v. Lloyd A. Frye Roofing Co.
308 F.2d 383, 392 (6th Cir. 1962) *cert. denied*,
372 U.S. 907 (1963) 19

Wyoming Construction Co. v. Western Casualty & Surety Co.
275 F.2d 97 (10th Cir. 1960) *cert. denied*,
362 U.S. 976 (1960) 9

Statutes:

15 U.S.C. ¶1 ..... 4, 10

15 U.S.C. ¶15 17

Other Authorities:

3 J. MOORE, FEDERAL PRACTICE (2d Ed. 1974) .. 9

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Respondents pray that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit be denied.

OPINIONS BELOW

The opinion of the district court is reported in *Beltronics, Inc., et al. v. Eberline Instrument Corporation, et al.*, 369 F. Supp. 295 (D. Colo. 1973) [hereinafter cited as "Beltronics I"], and was affiirmed by the Court of Appeals for the Tenth Circuit in *Beltronics, Inc. v. Eberline Instrument Corpora-*

tion, et al., 509 F.2d 1316 (10th Cir. 1974) [hereinafter cited as "Beltronics II"]. For the Court's convenience citations to pages of the petition appendix will also be given.[1]

JURISDICTION

The jurisdictional requisites are adequately recited in the Petition.

QUESTIONS PRESENTED

Respondents Eberline Instrument Corporation and Capco, Inc. (hereinafter referred to collectively as "Eberline" or, where appropriate, individually as "Eberline" or "Capco") respectfully submit that the Questions Presented by Petitioner are inappropriate in that they contain factual or procedural issues resolved against Petitioner by the trial court and either affirmed by the United States Court of Appeals for the Tenth Circuit or not challenged on appeal, as follows:

1. Petitioner's Question No. 1 describes an anti-trust claim which the trial court held to be outside the scope of the pleadings, and the claim was therefore not litigated at trial. (See Statement of the Case, *infra.*) The Court of Appeals did not disturb the trial court's holding.

2. Petitioner's Question No. 1 expressly assumes that Eberline could directly sell the ultimate product, a telephone instrument component called a capacitor, to the Bell Com-

[1]References to the Appendix to Petitioner's PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT will be cited as "App._____". References to the appendix of the record filed with the Court of Appeals, lodged with the Clerk of the Court, will be referred to as "RA_____".

panies. Petitioner conceded in its Brief of Appellants in the Court of Appeals for the Tenth Circuit that the Bell Companies' parent preferred that all Bell Companies' purchases pass through AT&T's wholly-owned subsidiary, Western Electric, and that they be approved by Bell Laboratories. (Apnt. Br., Ct. App. at p. 12; RA 465-466)

3. Petitioner's Question No. 2 also assumes facts not found by the trial court. There is no finding below that Western Electric, the so-called "first manufacturer", used its alleged market control through the alleged restrictions in this case to prevent competition with it for sales to the so-called ultimate consumer, the Bell Companies. Nor is there a finding that Western Electric "forced" Eberline to terminate Beltronics' contract. The District Court found that Western Electric refused to do business with Petitioner Beltronics because Western Electric had reasonable grounds to believe that a Beltronics' principal had acted in violation of Western Electric's purchasing policies. *Beltronics I*, 369 F. Supp. at 300 (App. 9a-10a) The Court of Appeals for the Tenth Circuit correctly reported that Beltronics negotiated the agreement which contained the alleged restrictions about which Beltronics complains, and Beltronics' own conduct resulted in Western Electric's decision to stop the business relationship. *Beltronics II*, 509 F.2d at 1319 (App. 29a-30a)

4. Petitioner's Question No. 3, although denominated subsidiary by Petitioner, overlooks the fact that the experienced trial judge below considered Plaintiff's evidence concerning damage to be wholly speculative and refused to admit it in evidence.

STATUTES INVOLVED

The statutory provisions involved are adequately presented in the Petition.

STATEMENT OF THE CASE

Respondents Eberline and Capco controvert Petitioner Beltronics' statement of the case since it is materially incomplete.

Beltronics' statement of the case fails to state that Beltronics' claim that defendants had violated Section 1 of the Sherman Act by virtue of purported resale restrictions on Western Electric cable (hereinafter referred to for convenience as the "Schwinn claim") was never properly pleaded to the trial court, was properly excluded from the pretrial order, and was accordingly never litigated in the trial court. The petitioner fails to discuss key findings of fact and conclusions of law of the trial court, which were left undisturbed by the Court of Appeals.

The instant case began on June 23, 1969 as a state court contract action in which Beltronics sought damages from Eberline and Capco for breach of an Exclusive Sales Representative Agreement, dated January 2, 1969. (RA 73) Subsequently, after removal to the United States District Court for the District of Colorado and after the case was at issue, Beltronics, Inc. was allowed to add Western Electric as a party and raise a "group boycott" antitrust claim under the complaint's Fourth Claim filed on March 31, 1970. (RA 49) In December, 1970, Beltronics, Inc. was permitted to file an Amended Fourth Claim. This represented the second amendment of the original complaint. Later, in June, 1972, Beltronics filed a further motion for leave to amend its Amended Fourth Claim. (RA 148) In this third attempted amendment Beltronics asserted, for the first time, that Defendants had violated Section 1 of the Sherman Act by virtue of purported resale restrictions on Western Electric cable, Petitioner's purported *Schwinn* claim. (RA 155)

In September, 1972 the Court denied Beltronics' motion for leave to amend the Amended Fourth Claim to assert the *Schwinn* claim. During trial, District Judge Hatfield Chilson explained that the motion to amend for the third time was denied because Beltronics had been allowed to amend its Complaint on previous occasions and the case was over three years old at the time the motion was denied. (RA 335, 461-462) The case was tried under a Pre-Trial Order which did not include the *Schwinn* claim now asserted in Petitioner's petition for certiorari. (RA 173) Evidence concerning the alleged resale restrictions and the *Schwinn* claim was not admitted in evidence. (RA 333-335, 459-463, 525-530)

Eberline became a party to dealings with Western Electric by virtue of its purchase of all the outstanding stock of Beltronics in 1968. Beltronics acted as Eberline's exclusive sales agent for capacitors in sales to Western Electric. Later, in January, 1969, all of Beltronics' stock was resold to its former shareholders, Messrs. King and Peterson. (RA 31) Thereafter, as before, Beltronics acted as an exclusive sales agent for Eberline and Capco under an Exclusive Sales Representative Agreement. (RA 14) The Exclusive Sales Represenetative Agreement was later cancelled by Eberline, bringing about the instant litigation.

In support of its asserted *Schwinn* claim, Petitioner argues that title to and dominion over the Western Electric cable passed to Midwec Corporation under Midwec's previous supply contract with Western Electric. (Petition at p.8) The assertion is inapplicable and misleading because there were no such findings concerning the Western Electric-Eberline supply contract, Contract No. G 82331 D, which was in force from August 1, 1968 through April 30,

1969, and the evidence is insubstantial on that point. (RA 969-976) Supply Contract G 82331 D committed Western Electric to purchase Eberline products made with its cable and provided that Western Electric would sell cable to Eberline to be used in Eberline's manufacture of the capacitor products sold to Western Electric as follows:

> We [Western Electric] agree to sell and you [Eberline] *agree to purchase, at the prices* indicated below, the following material. This material is to be used solely for the performance of this contract. [referring to the Supply Contract] (RA 969, 972)

The Western Electric commitment to purchase and the so-called restriction are in one integrated supply contract under which Western Electric was buying capacitors. There is no assertion by Petitioner, and no record evidence, that any dispute ever arose over these provisions prior to Petitioner's attempted amendment of its Fourth Amended Claim, or that Western Electric ever enforced any restriction pertaining to the Western Electric cable. These contract provisions do indicate that Eberline did not acquire the normal indicia of title, or "dominion" over the cable, since Eberline could only use the cable in the manufacture of products it resold to Western Electric under the contract. As the Court of Appeals specially noted, the supply contract was negotiated by Beltronics. *Beltronics II*, 509 F.2d at 1319 (App. 29a) Contrary to the assertion at p.8 of the Petition, there have been no findings by the District Court, or the Court of Appeals, that title, dominion over and risk of loss of Western Electric's cable passed to Midwec, Beltronics or Eberline. No such allegations were set forth in the Amended Fourth Claim and the supply contract between Eberline and Western Electric effectively retains to Western Electric the dominion over the cable to be used in filling the contract.

It also commits Western Electric to repurchase the supplied cable on an as-ordered basis in the form of capacitors. (RA 969)

Petitioner also fails to note that the trial court found that Western Electric's decision to terminate its relationships with Petitioner Beltronics was unilateral and was based solely upon Beltronics' violation of entertainment and gift policies of Western Electric, a Beltronics' principal's unauthorized taking and improper use of a Western Electric internal document, and uncertainty of the respective roles of Beltronics, Eberline and Capco and confusion as to which should be the contracting party. The trial court found that the Western Electric decision "was made unilaterally by Western Electric without prior consultation with Beltronics, Eberline or Capco," *Beltronics I*, 369 F. Supp. at 300 (App. 9a), and "was not made in accordance with any plan, scheme or design by Western Electric or by Eberline and Capco or by a combination of the three to suppress competition or to restrain or monopolize trade in violation of the Federal Anti-Trust Laws." *Beltronics I*, 369 F. Supp. at 301 (App. 13a)

Petitioner also fails to discuss the trial court's finding, left undisturbed by the Court of Appeals, that the purpose of specifications in the Western Electric-Eberline supply contract, such as the provisions requiring use of the Western Electric cable, is to control the quality of the finished products sold to Western Electric and supplied to the telephone companies. *Beltronics I*, 369 F. Supp. at 297 (App. 3a)

Petitioner on p.8 of its Petition asserts that it "sold" capacitors. The record is clear that at no time material here did Petitioner act as anything but a sales representative. (RA 616-619)

REASONS FOR DENYING WRIT

Supreme Court Rule 19 states that a petition for writ of certiorari will be granted only where there are special and important reasons for granting the petition. No such reasons are evident here. Petitioner Beltronics contends that the Court of Appeals incorrectly distinguished *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). It has also contended that the Court of Appeals' decision that Beltronics was not and could not have been damaged by the restrictions is in conflict with *Perkins v. Standard Oil Company of California*, 395 U.S. 642 (1969). Petitioner's arguments that this case deserves the exercise of this Court's discretion to grant the petition are without legal or factual substance.

The trial court's findings and conclusions, affirmed on appeal, clearly support the court's decision and the decision does not result in any new or distinctive rule of law in conflict with any decision of this Court.

Respondents Eberline's and Capco's position that the petition should be denied can be summarized as follows:

1. The trial court's decision, not overturned on appeal, that an amendment to include the *Schwinn* claim should not be allowed avoids any conflict between the lower court's rulings and opinions and the *Schwinn* doctrine.

2. Because of the distinctive factual situation and contractual relationships involved in the case, as found by the District Court, and affirmed by the Court of Appeals, there is no conflict between the decision of the Court of Appeals and this Court concerning the *Schwinn* case.

3. The *Schwinn* case has no application to Eberline under the trial court's unchallenged and undisturbed findings.

4. There is no conflict between the decisions of the trial court and Court of Appeals and this Court's decision in *Perkins v. Standard Oil Company* in view of the findings of the trial court, affirmed by the Court of Appeals.

5. The decisions below are based on alternative holdings, and even if one of the alternative holdings may be incorrect the decisions are correct and therefore the Court is unlikely to reach any issue of substantial importance.

I.

THE *SCHWINN* DOCTRINE CLAIM WAS OUTSIDE THE SCOPE OF PETITIONER'S PLEADINGS, AN UNCURED DEFECT WHICH HAS NOT BEEN RAISED IN THE PETITION FOR A WRIT OF CERTIORARI.

The District Court refused to include the *Schwinn* claim in the Pre-Trial Order or permit evidence in support of the claim to be introduced because of several previous amendments of the complaint and the long pendency of the case. (RA 153; 461-462; 333-335; 459-463; 525-530). These rulings were not reversed by the Court of Appeals. Under established appellate practice, the lower courts' discretionary rulings are not to be lightly overturned. Thus, Petitioner Beltronics should now be bound by the pleadings of its Amended Fourth Claim and the pleadings do not include the *Schwinn* claim it now asserts. *Wyoming Construction Co. v. Western Casualty & Surety Co.*, 275 F.2d 97 (10 Cir. 1960), *cert. denied*, 362 U.S. 976 (1960). *See, also*, 3 J. MOORE, FEDERAL PRACTICE ¶15.08[4], at 895, n.1 (2d Ed. 1974), and cases cited therein.

Beltronics' Amended Fourth Claim, upon which the case was tried, did not contain the elements of a *Schwinn* type violation. The *Schwinn* claim was not asserted until almost 3 years after Petitioner started the case, when it moved to amend to state its Second Amended Fourth Claim. (RA 148) In the Amended Fourth Claim Petitioner made no allegations that the Western Electric-Eberline supply contracts (which Petitioner negotiated) prohibited resale of the subject products to parties other than Western Electric; there was no allegation that, under the supply contract, Western Electric parted with title, dominion and risk of loss of the cable; there was no allegation that the cable resale restriction involved customer or territorial limitations, or that the restriction was resolutely insisted upon or enforced. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) at 372, 379; *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637 (10th Cir. 1973), *cert. denied*, 411 U.S. 987 (1973).

The only control alleged over the sales of the subject products to the Bell System Companies in the Fourth Amended Claim is a control allegedly maintained through the cooperation of the Bell System Companies in ordering only from suppliers approved by Western Electric. (Complaint, ¶¶37, 45; RA 103, 104, 106) The Amended Fourth Claim does not contend that the Bell Companies are co-conspirators nor, as indicated above, does the Amended Fourth Claim mention the cable resale restriction. (Compare Petitioner's Second Amended Fourth Claim at ¶47(d), RA 155). The Amended Fourth Claim upon which the case was tried is based solely upon the theory that the Sherman Act, Section 1, was violated by an alleged group boycott or concerted refusal to deal on the part of Western Electric and Eberline. (¶¶46, 47, RA 106-107) The group boycott issue is not raised in Petitioner Beltronics' Petition here and is an issue ex-

plicitly found against Petitioner as to matters of fact and law by the courts below. (*See, e.g., Beltronics I*, 369 F. Supp. at 301, 303-304; *Beltronics II*, 509 F.2d at 1320; App. 13a; 20a-21a; 32a).

The case of *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) [cited hereinafter as "*Klors*"], was principally relied on by Petitioner in the District Court and the Court of Appeals, but Petitioner has abandoned its *Klors* claim here. Of course, a *Klors* violation has very different elements from a *Schwinn* claim and requires very different evidence in proof or defense. A *Klors* type case must involve a group boycott or concerted refusal to deal involving a competitor of the plaintiff. By contrast, a *Schwinn* type case requires customer or territorial restrictions on those in the vertical distribution chain ("downstream" [*Beltronics II*, 509 F.2d at 1320; App. 31a]) where the manufacturer has parted with title to, dominion over and risk of loss of the goods in question and resolutely insists on the restrictions. *Schwinn*, 388 U.S. at 372, 375, 378-379. In short, Petitioner's *Schwinn* theory is an after-thought, now ripened to its only hope for relief. But, Petitioner's pleadings do not permit the raising of *Schwinn* issues at the late stages of the litigation.

Were the decisions of the trial court and Court of Appeals remanded, the Petitioner would still face the hurdle of convincing the trial court that its Second Amended Fourth Claim should be permitted in order to allow presentation of a *Schwinn* claim. Unless this Court now orders allowance of the belated amendment, there is no reason to believe that the trial court would reverse itself if it would again be faced with a third attempted substantive amendment of the original Complaint asserting a new and different type of alleged violation of the Sherman Act requiring additional discovery in a case now almost 6 years old.

The Court of Appeals did not reverse the trial court's refusal to permit such amendment. Instead it went directly to its view that, under the facts found by the trial court, *Schwinn* had no application. Therefore, review by the Supreme Court would not solve the Petitioner's underlying problem that a further amendment to the pleadings will be necessary before the *Schwinn* doctrine can be presented.

II.

UNDER THE FACTS FOUND BY THE TRIAL COURT AND UPHELD BY THE COURT OF APPEALS, THERE IS NO CONFLICT BETWEEN THE DECISION OF THE LOWER COURTS AND *UNITED STATES V. ARNOLD SCHWINN & CO.*

In *Schwinn* this Court found that Schwinn had been "firm and resolute" in insisting upon observance of territorial and customer limitations and that Schwinn had parted with title, dominion over the product and risk of loss. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) at 372, 379. *Schwinn* also involved a sophisticated marketing structure composed of intermediate wholesalers and franchised retailers. The Court of Appeals, in distinguishing *Schwinn*, stated that:

> *Schwinn* was concerned with a contract between a producer and a distributor in which the producer imposed restrictions on resales by the distributors and retailers. We are not concerned with a vertical relationship such as that in *Schwinn*. The Court there [in *Schwinn*] was concerned with the anticompetitive effects of a manufacturer's restrictions *downstream* in the channels of distribution.
>
> We are concerned [here] with an agreement for the sale by Western to Eberline of cable, and the sale of

> capacitors by Eberline to Western. In *Schwinn* the manufacturer *parted with dominion, and the restrictions on sale affected transactions by distributors and retailers.* In our case we have no impediment to competition. Eberline purchased cable from Western, used the cable in making capacitors, and sold the capacitors to Western. *In effect, Western bought cable back, albeit in a different form. Schwinn* has no application. (Emphasis added) *Beltronics II*, 509 F.2d at 1320

Thus, the Tenth Circuit Court implicitly construed the instant situation to be one in which Western Electric did not part with dominion over the cable since it contractually repurchases the cable in a different form. The purchase and sale terms of the Western Electric-Eberline supply contract are so inter-related that "dominion" cannot be said to pass to Eberline. Nor is there any evidence in the instant case of any "firm and resolute" insistence communicated to Eberline with respect to resales to Western Electric only and not the Bell Companies.[2] This is not a situation in which a manufacturer is dealing with its own vertical marketing system and restricting resale to its intermediate wholesalers or franchised retailers downstream into the marketplace. In addition, Petitioner's assertions that the alleged restrictions also prevented unfettered resale of the products to non-Bell telephone companies is in error. The trial court found in an unchallenged finding that here the market for the products in question was "almost entirely, if not entirely" limited to Western Electric and, in turn, Petitioner concedes that the Bell Telephone Companies were the only market. *Beltronics I*, 369 F. Supp. at 298 (App. 5a; Petition p.17).

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[2]Indeed, one of Beltronics' principals admitted he had never been told that he could not sell direct to the Bell Companies. (RA 424). There is no evidence of any attempt by Eberline to sell directly to a Bell Company.

The Court of Appeals and the trial court found no evidence of any predatory practice or anticompetitive purpose linked to the so-called "resale restriction". Indeed, the District Court found in another undisturbed finding that the purpose of specifications in the Western Electric-Eberline suply contract, such as the provisions requiring use of Western Electric cable, is to control the quality of the finished products sold to Western Electric and supplied to the Bell companies. *Beltronics I*, 369 F. Supp. at 297 (App. 3a). Western Electric's refusal to deal with Beltronics did not occur because of the resale restriction. *Beltronics I*, 369 F. Supp. at 300-301 (App. 12a-13a) The District Court found the sole reasons for termination were Western Electric's unilateral decision that Beltronics violated Western Electric's purchasing policies, and uncertainty as to the respective roles of Beltronics, Eberline and Capco, and confusion as to which should be the contracting party. *Beltronics I*, 369 F. Supp. at 300-301 (App. 13a). These findings were unchallenged in the Court of Appeals but were affirmed specially. *Beltronics II*, 509 F. 2d at 1318-1319 (App. 27a) There are no findings and no evidence was introduced concerning *Schwinn* concepts such as "dominion", "risk of loss", and "title". Petitioner therefore has little or no record upon which to argue its *Schwinn* claim.

III.

WITH RESPECT TO THE ALLEGED *SCHWINN* CLAIM, THERE IS NO BASIS FOR REVIEW OF THE LOWER COURT'S HOLDINGS WITH RESPECT TO EBERLINE.

Petitioner, in recognition of the fact that it was not a party to the supply contract containing the alleged restric-

tion on resale, states in its Petition that Eberline is the party directly injured by the restriction.[3] It has been previously noted that Petitioner also acknowledges that the only market Eberline had for the capacitors was the Bell Telephone Companies. (Petition, p.17). The unchallenged findings of the trial court show that all of Western Electric's actions with respect to Beltronics were unilateral and thus Eberline was not involved, in the anti-trust sense, in any allegedly offending conduct. Further, as the Court of Appeals observes, the resale restriction was negotiated by Beltronics, not Eberline. *Beltronics II*, 509 F. 2d at 1319 (App. 29a).

Thus, leaving aside Beltronics' argument that "injury in fact" exists under *Perkins v. Standard of California*, 395 U.S. 642 (1969) (hereinafter "*Perkins*"), it is nonetheless clear that, in the absence of a finding of conspiracy or collusion between Eberline and Western Electric, as Petitioner urged at trial, any *Schwinn* type restriction operates only against Eberline. Even if the Beltronics-negotiated restriction could rise to the level of a *Schwinn* violation, Eberline would not properly be a defendant against which relief could be sought by Beltronics. For that reason, the trial court's and Court of Appeals' decisions should be deemed final as to Eberline.

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[3]Petitioner states: "While Eberline is not a plaintiff, it was nevertheless damaged by reason of the resale restrictions because they prevented Eberline from selling the products directly to the Bell Telephone Companies, as well as the non-Bell purchasers." (Emphasis supplied) (Petition, p.17) Of course, there is no evidence of any damage to Eberline by virtue of the alleged restriction. There is no evidence that Eberline lost any profits or sales by virtue of the supply contract's terms.

IV.

THE FACTUAL BASES FOR THE LOWER COURTS' FINDINGS AND CONCLUSIONS THAT NO DAMAGE COULD BE OR WAS CAUSED TO BELTRONICS PRECLUDES ANY CONTENTION THAT THE COURT OF APPEALS' DECISION CONFLICTS WITH *PERKINS V. STANDARD OIL COMPANY OF CALIFORNIA.*

The Court of Appeals has correctly noted that "Beltronics' loss was not caused by the restrictions but by its own conduct which resulted in Western's decision to stop business relations" with Beltronics. *Beltronics II*, 509 F.2d at 1319 (App. 30a).

Petitioner has not challenged below or here the trial court's finding that Western Electric was justified in unilaterally terminating its relationships with Beltronics. *Beltronics I*, 369 F. Supp. at 300-301 (App. 10a-13a) In short, the supply contract restriction did not affect Beltronics. There is no finding or evidence that the restriction had any effect on Eberline's dealings with Beltronics or was a motivation for Western Electric's termination of its relationship with Beltronics.

Additionally, there is no evidence of any desire or effort by Beltronics or Eberline at any material time to deal with companies other than the Bell Companies or to deal with the Bell Companies other than through Western Electric. As Petitioner concedes, the Bell Companies were the only market for Eberline's capacitor products. (Petition, p.17).

Petitioner's strained efforts on page 18 of its Petition to construct a causal connection between the supply contract restriction and Eberline's termination of the exclusive sales

agency agreement is unsupported by any reference to the record, by any evidence or by any finding of the trial court. Incredibly, Petitioner apparently contends at page 18 that the much sought after Western Electric supply contract was an "impairment of Eberline's business". Petitioner's next contention that the resale restrictions "acted directly upon Beltronics by first preventing Beltronics from selling directly to Bell Telephone Companies and later by forcing Eberline to accede to Western Electric's directive to terminate Eberline's relationship with Beltronics" (Petition, p.18) cannot be supported by any reference to the trial court's findings or the record. The only cause of Beltronics' loss was Beltronics' violations of Western Electric's policies and not the wholly unrelated special supply provisions upon which Petitioner now relies.

Petitioner's reliance on *Perkins v. Standard Oil Co.* is ill-founded. *Perkins* clearly recognizes the necessity of showing in civil damage cases a causal connection between the alleged violation and the alleged injury suffered. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969) Consistent with that holding and ancillary to determining the post-tertiary level price discrimination issue, the Court considered Perkins individually to have been "the principal victim . . . since he was directly injured. . .". *Id.*, 395 U.S. at 649. In the instant case there is no injury flowing from the restriction and Beltronics is is no sense a "victim" of it.

Similarly, Petitioner cannot meet the standards of the principal case it cites, *In Re Multidistrict Vehicle Air Pollution MDL No. 31*, 481 F.2d 122 (9th Cir. 1973), *cert. denied*, 414 U.S. 1045 (1973) [hereinafter cited as "*Multidistrict Vehicle Air Pollution*"]. In that case the Ninth Circuit Court noted that standing under Section 4 of the Clayton Act has two distinct ingredients: first, the interests al-

legedly injured must fall within the scope of anti-trust protection and "[a] second and distinct ingredient demands that a plaintiff show that the *defendant's conduct contributed to his injury.*" (Emphasis added). *Id.*, 481 F.2d at 129, n.11. Petitioner Beltronics cannot show any evidence of any contribution to its alleged injury by the supply contract provisions.[4]

Petitioner's evidence thus falls short of satisfying any test of standing or causation. *See, e.g., Riebert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir. 1973), *cert. denied*, 411 U.S. 938 (1973); *Billy Baxter, Inc. v. Coca Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1970).

V.

THE LOWER COURT'S HOLDINGS ARE ALTERNATIVE HOLDINGS, HOLDING NOT ONLY THAT NO *SCHWINN* CLAIM WAS ASSERTED OR ESTABLISHED AND THAT DEFENDANT'S CONDUCT DID NOT CONTRIBUTE TO ANY INJURY OF PETITIONER, BUT ALSO HOLDING THAT THERE WAS NO COMPETENT EVIDENCE TO SHOW THAT PETITIONER WAS DAMAGED IN ANY EVENT.

The trial court excluded Petitioner Beltronics' damage evidence based on a "lost profits" theory for the reason that the court considered it speculative.

Beltronics based its theory of damages, as represented by its offer of proof, (RA 900-918) upon alleged loss of

[4] *In Multidistrict Vehicle Air Pollution*, the Court stated as to one class of dismissed plaintiffs, that they were "not targets of the alleged conspiracy, they were not even on the firing range." *Id.*, 481 F.2d at 129. Here, Eberline did not even fire a shot, according to the trial court's findings.

profits over a 10-year period from 1969 to 1978, on an assumption of the continuation of both Eberline's Western Electric supply contract and Beltronics' Exclusive Sales Representative Agreement with Eberline. Fifteen percent annual increases in sales were projected. On the other hand, Beltronics' alleged profit percentages were based upon 1966 data, the last full year in which Beltronics served as sales agent for Midwec Corporation. The Court considered Beltronics' experience as Midwec's sales agent to be irrelevant and the projection of future profits to be too speculative. Similar evidence has been condemned in other cases. *See, e.g., Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972); *Continental Baking Co. v. Utah Pie Co.*, 396 F.2d 161 (10 Cir. 1968), *cert. denied*, 393 U.S. 860 (1968). The "offer of proof" (RA 900-918), although arguably trial counsel's theories and not evidence, clearly shows that Petitioner's projections were "arbitrarily taken out of thin air". *Volasco Products Co. v. Lloyd A. Frye Roofing Co.*, 308 F.2d 383, 392 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963). There is also strong authority for the proposition that the proper measure of damage for a company which has gone out of business due to an alleged refusal to deal is its lost profits *prior* to its cessation of business plus a going concern value as of that date, but not including further compensation for lost *future* profits. *See, e.g., Farmington Dowell Products Co. v. Forester Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969); *Albrecht v. Harold Co.*, 452 F.2d 124, 131 (8th Cir. 1971); *Gustafson v. General Motors Acceptance Corporation*, 470 F.2d 1057, 1061 (8th Cir. 1973).

The trial court's refusal to admit such wholly speculative evidence was proper. Although the rule for measuring dam-

age may be liberal once the "fact of injury" has been shown, this does not avoid the requirement that such evidence be probative and meet minimum standards of admissibility. *See, e.g., Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

CONCLUSION

In view of the alternate holdings that there is (1) no *Schwinn* claim, (2) no showing of the fact of injury and (3) no probative evidence of the amount of damage, the Petition should be denied on all or any one of the foregoing grounds.

The decisions below are legally correct, supported by well-established precedent and by substantial evidence. Contentions advanced by Petitioner for grant of the Writ of Certiorari are insubstantial, and founded on erroneous factual premises not found by the trial court. There are no special or important reasons for granting the Petition for the reasons previously stated.

For the foregoing reasons, Respondents respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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